

Appeal from a decision of the Idaho State Office, Bureau of Land Management, declaring unpatented mining claims abandoned and void for failure to file an affidavit of assessment work for the claims on or before December 30, 1994. IMC 34076 through IMC 34078.

Affirmed.

1. Mining Claims: Abandonment–Mining Claims: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold–Mining Claims: Rental or Claim Maintenance Fees: Generally–Mining Claims: Rental or Claim Maintenance Fees: Small Miner Exemption

The affidavit of assessment work performed by a small miner claiming a maintenance fee waiver shall be filed with the proper BLM office in accordance with sec. 314 of FLPMA, 43 U.S.C. § 1744 (1988), and 43 CFR 3833.1-7(b) (1994).

APPEARANCES: Barry Marcus, Esq., Boise, Idaho, for appellant; Kenneth M. Sebby, Esq., Office of the Field Solicitor, Boise, Idaho, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE BYRNES

Dale J. LaCrone has appealed from the March 20, 1995, ^{1/} decision of the Idaho State Office, Bureau of Land Management (BLM), declaring unpatented mining claims IMC 34076 through IMC 34078 abandoned and void for failure to file an affidavit of assessment work for the claims by December 30, 1994.

On August 27, 1993, LaCrone filed a "Certification of Exemption from Payment of Rental Fee" covering the claims for the assessment year running from September 1, 1992, through September 1, 1993, as well as a "Certification of Exemption" for the assessment year running from September 1, 1993,

^{1/} On Jan. 11, 1996, counsel for BLM requested that the Board expedite its review of this appeal. We have granted that request and this appeal has been advanced on the docket for decision.

September 1, 1994, as required by the Act of October 5, 1992 (the 1992 Act), P.L. 102-381, 106 Stat. 1374.

In its decision, BLM stated:

Pursuant to Federal regulation 43 CFR 3833.1-7(b) [2/] an affidavit of assessment work performed by a small miner claiming a maintenance fee waiver shall be filed with the proper BLM pursuant to 43 CFR 3833.2. We did not receive evidence of assessment work for the above claims by December 30, 1994, as required by the Federal Land Policy and Management Act of 1976 (FLPMA) (43 U.S.C. 1744) and Federal regulation 43 CFR 3833.2. [Emphasis in original].

Based upon this failure to file the evidence of assessment work, BLM declared the claims abandoned and void by operation of law pursuant to section 314(c) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(c) (1988).

Section 10101(a) and (d) of the Act of August 10, 1993, the Omnibus Budget Reconciliation Act of 1993 (the 1993 Act), P.L. 103-66, 107 Stat. 405-6 (30 U.S.C.A. § 28f(a) and (d) (West 1995)), provides:

(a) CLAIM MAINTENANCE FEE.—The holder of each unpatented mining claim, mill or tunnel site located pursuant to the Mining Laws of the United States, whether located before or after the enactment of this Act, shall pay to the Secretary of the Interior, on or before August 31 of each year, for years 1994 through 1998, a claim maintenance fee of \$100 per claim. Such claim maintenance fee shall be in lieu of the assessment work requirement contained in the Mining Law of 1872 (30 U.S.C. 28-28e) and the related filing requirements contained in section 314 (a) and (c) of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1744 (a) and (c)).

* * * * *

(d) WAIVER.—(1) The claim maintenance fee required under this section may be waived for a claimant who certifies in writing to the Secretary that on the date the payment was due, the claimant and all related parties—

(A) held not more than 10 mining claims, mill sites, or tunnel sites, or any combination thereof, on public lands; and

2/ BLM's reference is to the version of this regulation promulgated on Aug. 30, 1994, discussed infra.

(B) have performed assessment work required under the Mining Law of 1872 (30 U.S.C. 28-28e) to maintain the mining claims held by the claimant and such related parties for the assessment year ending on noon of September 1 of the calendar year in which payment of the claim maintenance fee was due.

On August 30, 1994, the Department promulgated final regulations implementing the 1993 Act. 59 FR 44846 (Aug. 30, 1994). Consistent with the 1993 Act, 43 CFR 3833.1-5 provides that "each claimant shall pay a nonrefundable maintenance fee of \$100 for each mining claim, mill site, or tunnel site to the proper BLM office for each specified assessment year for which the claimant desires to hold the mining claim, mill site, or tunnel site." 43 CFR 3833.1-5 (1994). Also consistent with the 1993 Act, the regulations provide for a waiver of this maintenance fee payment requirement: "[A] small miner may, under certain conditions * * * perform the assessment work required under 30 U.S.C. 28-28e and record it pursuant to Section 314(a) of FLPMA and § 3833.2 in lieu of paying the maintenance fee." 43 CFR 3833.1-6 (1994). ^{3/} Similarly, 43 CFR 3833.1-5(d) provides that "[a] small miner may, under the waiver provisions of §§ 3833.1-6 and 3833.1-7, perform assessment work and file the affidavit of labor pursuant to § 3833.2 in lieu of paying the rental or maintenance fee."

To summarize, the claim maintenance fee is waived for a claimant who certifies in writing that the above conditions have been met. However, in addition to filing the waiver certification pursuant to the 1993 Act and implementing regulations, the claimant is also required to perform assessment work on the claim and file an affidavit of assessment work pursuant to section 314(a) of FLPMA and 43 CFR 3833.2. In explaining revisions to 43 CFR 3833.1-7, which identifies the filing requirements for maintenance fee waivers, the Department made clear that filing both the certification waiver and the affidavit of assessment work is required:

[Section 3833.1-7] operates in advance of each upcoming assessment year. The assessment work performed during a given assessment year, certified to under this section, holds the mining claim for the next assessment year without payment of the maintenance fee. For those claimants who do not pay the required claim maintenance fee and who instead seek a waiver from such payment requirement, the failure to file a certified statement by each August 31 certifying that the assessment work was done for the assessment year just ending will cause the mining claim to be forfeited under the Act. In addition, failure to file affidavits of annual assessment work on or before December 30 of the year in which the small miner certification was made will cause the mining claim to be forfeited under the Federal Land

^{3/} The maintenance fee waiver qualifications are set forth at 43 CFR 3833.1-6(a) (1994).

Policy and Management Act. (For example, a certification filed by a qualified claimant on August 31, 1994, certifies performance of assessment work for the assessment year that began at noon on September 1, 1993. This allows a waiver of payment of the maintenance fee due on August 31, 1994, to hold the claim for the assessment year beginning at noon on September 1, 1994. However, if the affidavit of labor is not filed by December 30, 1994, for the work done for the assessment year beginning at noon September 1, 1993, the claims are deemed abandoned and void and are forfeited. This process begins again with the next certification deadline of August 31, 1995).

59 FR 24573 (May 11, 1994).

As noted, LaCrone filed a waiver certification for the assessment year beginning September 1, 1993, pursuant to the 1992 Act. This filing was sufficient under the 1993 Act, pursuant to 43 CFR 3833.1-7(a), which provides:

If no change in status has occurred, a small miner exemption certification previously filed for the assessment year ending at noon on September 1, 1994, under the Act of October 5, 1992 (Pub. L. 102-381, 106 Stat. 1374), and the pertinent regulations in effect on August 31, 1993, will be considered a proper certification filing for a waiver of payment of the maintenance fee due on August 31, 1994.

However, LaCrone failed to file an affidavit of assessment work by December 30, 1994. In the petition for a stay of BLM's decision which LaCrone filed with the Board, 4/ he explained the circumstances which led to his failure to file the affidavit of assessment work:

Based upon what was * * * a misunderstanding in the communication, or a misstatement of the applicable requirements of law by an employee of the Bureau of Land Management, the affidavit of assessment work was not timely filed prior to December 30, 1994, under the apprehension that the same need not be filed. Nevertheless, the assessment work had otherwise been literally performed and duly recorded in the office of the appropriate county recorder * * *.

(Petition for Stay at 4).

[1] In his statement of reasons (SOR) for appeal, LaCrone contends that he was excused from filing the affidavit of assessment work on the basis that "[t]he Certificate of Exemption timely filed on August 31, 1994

4/ The Board granted LaCrone's petition for a stay by order dated May 8, 1995.

[sic] constituted, under the regulations, a notice of intent to hold the respective claims" (SOR at 3). LaCrone's argument fails because the regulations expressly require a small miner who claims a waiver from paying the maintenance fee to perform assessment work and file the affidavit of assessment work in accordance with section 314 of FLPMA and 43 CFR 3833.2. Under 43 CFR 3833.1-7(b), LaCrone was required to file an affidavit of assessment work by December 30, 1994: "The affidavit of assessment work performed by a small miner claiming a maintenance fee waiver shall be filed with the proper BLM office pursuant to § 3833.2 and shall meet the requirements of § 3833.2-4." The option of filing a notice of intention to hold the claims is not contemplated under 43 CFR 3833.1-7, the regulation which sets forth the filing requirements for the maintenance fee waiver.

LaCrone contends that an affidavit of assessment work was filed with the county recorder, but concedes that it was not filed with BLM. He also contends that his submission of a fee waiver request constitutes a notice of intention to hold; however, he does not aver that a copy of that document was filed with the county recorder. It has long been a requirement that whichever document was filed with BLM, it must be a copy of what was or will be filed with the county or local office of recordation. Even if the regulations contemplated the filing of a notice of intention to hold, LaCrone concedes that neither a notice of intention to hold nor an affidavit of assessment work was properly filed during the filing period ending December 30, 1994. See 43 CFR 3833.2-4 and 3833.2-5.

In support of his argument that filing the waiver certification satisfies the requirement for filing the notice of intention to hold the claims, LaCrone cites 43 CFR 3833.1-7(c), which provides: "For mining claims and sites covered by a waiver, the filing of a waiver certification * * * will satisfy the requirements for filing of a notice of intention to hold pursuant to § 3833.2-5, when such notice of intention to hold is otherwise required." The wording of this regulation raises the obvious question

of when the filing of a notice of intention to hold is otherwise required.

In the preamble to the final rule, the Department noted that two comments stated that this section should specify the situation where filing a notice of intention to hold is required. In response, the Department stated that "[t]he primary case where this would apply would be as to mill and tunnel sites." 59 FR 44853 (Aug. 30, 1994).

A notice of intent to hold a mill or a tunnel site would otherwise be required, i.e., if a certification waiver is not filed, because there is no requirement that the owner of a mill or tunnel site or a mining claim located the previous assessment year perform annual assessment on such sites. See 30 U.S.C. §§ 27, 28, and 42 (1994). The regulation relieves the claimant of the requirement to file a notice of intention to hold a mill site or tunnel site if it is covered by a certification waiver. However, because the claims at issue in this appeal are not mill sites or tunnel sites and were located in 1929, the performance of assessment work is required. As noted, 43 CFR 3833.1-7(b) provides that "[t]he affidavit

of assessment work performed by a small miner claiming a maintenance fee waiver shall be filed in the proper BLM office pursuant to § 3833.2 and shall meet the requirements of § 3833.2-4." 5/

The result of filing a waiver certification rather than paying the maintenance fee for the claims is that LaCrone is obligated to make the filings required of a small miner. LaCrone, as a small miner who did not pay the maintenance fee for his claims, was not relieved of the requirement to file an affidavit of assessment work by December 30, 1994. He was required to perform assessment work for the assessment year beginning September 1, 1993, and file the affidavit of labor in the proper BLM office by December 30, 1994. 43 CFR 3833.1-5(d) (1994); 43 CFR 3833.1-7(b) (1994). See 59 FR 44847 (Aug. 30, 1994). 6/

As noted above, the 1993 Act states that the payment of the maintenance fee is in lieu of assessment work and the "related filing requirements contained in section 314 (a) and (c) of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1744 (a) and (c))." However, the implementing regulations make clear that they contemplate allowing a small miner only to file an affidavit of assessment work. The regulations, therefore, purport to eliminate the option of filing a "notice of intention to hold" for mining claims if annual labor is required during the assessment year ending in the calendar year in question and a waiver of the maintenance fee has been granted. We decide this appeal based on the application of the plain language of the regulations. The Board has previously ruled that in enacting the 1993 Act Congress granted broad discretionary authority to the Secretary to determine how to implement the maintenance fee waiver provisions. Alamo Ranch Co., Inc., 135 IBLA 61, 75 (1996). However, in the context of this appeal, we need not reach the question whether the performance of annual assessment work, certification of said work on the date the maintenance fee is due, and a proper filing of a notice of intention to hold under FLPMA is sufficient to fulfill the statutory requirements of the 1993 Act and FLPMA.

5/ This provision is reinforced at 43 CFR 3851.3(c), which provides: "The Act of August 10, 1993, with certain exceptions for small miners, temporarily suspends and supersedes the requirement to perform assessment work under § 3851.1, and requires the payment of an annual \$100 maintenance fee per mining claim in lieu of the assessment work."

6/ The regulation which LaCrone cites in support of his argument actually undermines it:

"Except for filings and recordings required of a small miner qualifying for a waiver under § 3833.1-7 of [Title 43], filings under FLPMA that would have been due on December 30, 1994, and each December 30 through and including December 30, 1999, are waived effective January 1, 1994, and so long thereafter as the Act of August 10, 1993, is in effect. [Emphasis added]."

43 CFR 3833.0-5(o).

Having properly filed the certification of exemption from payment of the maintenance fees otherwise required by the 1993 Act, LaCrone was responsible for performing the assessment work required by the Mining Law of 1872, 30 U.S.C. §§ 28-28e (1994), and for meeting the filing requirements of section 314 of FLPMA. ^{7/} 107 Stat. 406; 43 CFR 3833.1-5(d); 3833.1-7(b). Section 314(c) of FLPMA provides, inter alia, that failure to file evidence of annual assessment work or a notice of intention to hold "shall be deemed conclusively to constitute an abandonment of the mining claim or mill or tunnel site by the owner."

The Board has consistently held that responsibility for complying with the recordation and filing requirements of FLPMA rests with the owner of the unpatented mining claim or mill site or tunnel site, as Congress mandated that failure to file the proper documents in the proper offices within the time periods prescribed in section 314 of FLPMA would, in and of itself, cause the claim or site to be lost. The Supreme Court upheld the constitutionality of section 314 of FLPMA, concluding that a mining claim for which timely filings are not made is extinguished by operation of law notwithstanding the claimant's intent to hold the claim. United States v. Locke, 417 U.S. 84, 97 (1985). Thus, section 314 of FLPMA is self-operative, and a claim must be deemed abandoned when an annual filing is not timely received. Ptarmigan Co., 91 IBLA 113, 118 (1986), aff'd, Bolt v. United States, 994 F.2d 603 (9th Cir. 1991). Congress did not provide for waiver of the section 314 requirements, and the Board has held that the Department is without authority to excuse lack of compliance, to extend the time for compliance, or to afford any relief from the statutory consequences. Lee Jesse Peterson, 133 IBLA 381 (1995); Lynn Keith, 53 IBLA 192, 196, 88 I.D. 369, 372 (1981).

We must assume that Congress was aware of the interpretation that this Department and the courts had given to section 314 of FLPMA and that it intended the present language under consideration to be given the same construction. Thus, there is no reason to deviate from this interpretation in this case. Accordingly, the failure of a mining claimant who qualifies for a small miner exemption to meet the filing requirements of FLPMA on the 10 or fewer claims within the time period specified in the 1993 Act and the implementing regulations results in a conclusive presumption of forfeiture.

LaCrone has not shown that he satisfied the regulatory requirement of filing the affidavit of assessment work with BLM during the mandatory filing period. As the record before us does not reflect that his assessment affidavit was timely filed on or before December 30, 1994, the subject mining claims were properly deemed to be abandoned and void. Lee

^{7/} We note that 30 U.S.C. § 28 (1994) provides: "The period within which the work required to be done annually on all unpatented claims located since May 10, 1872, * * * shall commence at 12 o'clock meridian on the 1st day of September succeeding the date of location of such claim."

Jesse Peterson, supra; Charlene Schilling, 87 IBLA 52 (1985); J. Neil Smith, 77 IBLA 239 (1983); Lynn Keith, supra. 8/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Bymes
Chief Administrative Judge

I concur.

Will A. Irwin
Administrative Judge

8/ We must reject LaCrone's other arguments. He asserts that he has complied with "all statutory requirements for a mineral patent," and that BLM has "wrongfully withheld the ministerial issuance of a formal document allowing mineral entry" (SOR at 2). Otherwise, he claims, he would be exempt from the requirement to file evidence of assessment work performed. We do not have the jurisdiction to address this issue in the posture of the present appeal.

In response to his contention that he performed excess assessment work for the assessment year ending Sept. 1, 1993, and that this excess work satisfies the requirement for the performance of assessment work for the year 1994, we need only point to 30 U.S.C. § 28 (1994), as amended by the Act of 1993, and 43 CFR 3851.1, which require, until a patent has issued for the claim, the performance of not less than \$100 worth of labor or improvements during each assessment year.

